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SURFACE TRANSPORTATION BOARD

CORRECTED DECISION*

STB Ex Parte No. 627

MARKET DOMINANCE DETERMINATIONS—PRODUCT AND GEOGRAPHIC COMPETITION

Decided: April 2, 2001

On remand, the Board reaffirms that its determination to exclude consideration of product and geographic competition from the market dominance analysis in rail rate cases is consistent with the Rail Transportation Policy set forth in 49 U.S.C. 10101 and is a reasonable accommodation of the various policy directives therein.

BACKGROUND

Prior Board Decisions

In a notice of proposed rulemaking served May 12, 1998,[1] we launched a reexamination of whether product and geographic competition should be considered in determining whether a defendant railroad has market dominance over the traffic involved in a rail rate case.[2] Market

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* This corrects the decision served April 3, 2001, to reflect more accurately the pleadings submitted in the proceeding.

[1] 63 Fed. Reg. 24588 (1998).

[2] At that time, we considered four types of competition in market dominance analyses:

- ***intramodal***, i.e., whether the complaining shipper can use other railroads to transport the same commodity between the same points;
- ***intermodal***, i.e., whether the complaining shipper can use other transportation modes, such as trucks or barges, to transport the same commodity between the same points;
- ***geographic***, i.e., whether the complaining shipper can avoid using the defendant railroad by obtaining the same product from a different source, or by shipping the same product to

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dominance "means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies," 49 U.S.C. 10707(a), and a finding of market dominance is a prerequisite to our review of the reasonableness of a challenged rail rate, 49 U.S.C. 10701(d)(1), 10707(b), (c).

In a decision served December 21, 1998 (1998 Decision), we determined that the statute does not require us to consider product and geographic competition in the market dominance analysis. 1998 Decision, slip op. at 10. Noting that 49 U.S.C. 10707(a) asks only whether any mode of transportation provides effective competition "for the transportation to which a rate applies," we were satisfied that "the plain language of the statute only requires that we consider alternatives for moving the same product between the same origin and destination points." Id. Moreover, Congress has directed us to apply the market dominance provision in a practical manner.[3] Therefore, we examined the burdens and benefits associated with considering evidence of product and geographic competition.

Based on our experience in rail rate cases (including the experience of our predecessor, the ICC), we found that inclusion of this evidence had "impose[d] substantial burdens on both the parties and this agency." 1998 Decision, slip op. at 10. We observed that discovery in individual cases had often included hundreds of questions directed to the existence or effectiveness of product and geographic competition and had frequently triggered discovery disputes that we had to resolve. Id. at 11. Furthermore, the evidence that had been introduced relating to alleged product and geographic competition had placed a substantial burden on us to address matters outside of our areas of expertise, requiring us to grapple with such complex non-transportation issues as: the feasibility of switching the generation of electricity from one plant to another; the utility industry's ability to "wheel" power over the electric power grid; the ability of a paper manufacturer to substitute different types of wood in its paper production process; and the feasibility of manufacturers' switching from aluminum to glass or plastic containers. Id. at

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[2](...continued)
a different destination; and

- ***product***, i.e., whether the complaining shipper can avoid using the defendant railroad by shipping or receiving a substitute product.

However, our predecessor, the Interstate Commerce Commission (ICC), had initially limited the market dominance analysis to consideration of intra- and intermodal competition. Special Proc. for Findings of Market Dominance, 353 I.C.C. 875 (1976), aff'd, Atchison T.&S.F. Ry. v. ICC, 580 F.2d 623 (D.C. Cir. 1978).

[3] Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) (4R Act), § 202(d).

11-12. Consideration of these matters had extended the time needed to resolve rail rate cases. Id. We concluded, id. at 12 (footnotes omitted), that:

> the time and resources required for the parties to develop, and for us to analyze, whether it would be feasible for a shipper to change its business operations (by changing its suppliers, customers, or industrial processes) so as to avoid paying the challenged rail rate can be inordinate. We . . . can more expeditiously, efficiently and effectively carry out our mandated functions by limiting the market dominance inquiry to the scope expressly required by the statute.

We acknowledged that product and geographic competition can provide effective alternatives that may be sufficient to constrain a rail rate to a reasonable level. 1998 Decision, slip op. at 10 n.49. However, in balancing the benefits to be gained from considering this potentially relevant evidence against the harm to shippers and to the administrative process from considering such evidence, we found that the scale clearly tilted in favor of excluding this evidence. Id. at 12-14.

We found it unlikely that a shipper with obvious product or geographic competition alternatives would pursue a costly and time consuming rate complaint before the Board, because either the railroad would keep its rates at reasonable levels or the shippers would take advantage of the alternatives available to them. 1998 Decision, slip op. at 12. However, even if a shipper were to file a rate complaint where effective product or geographic competition existed, we noted that the defendant railroad would not be subjected to a greater evidentiary burden because, under our evidentiary procedures, a railroad must present its evidence defending the reasonableness of a challenged rate before we make our market dominance finding.[4] Id. at 12-13. Furthermore, as the railroads' own expert witnesses had testified,[5] "the application [of our market-based rate procedures] tends to yield results not substantially different from rates set by competitive markets, albeit subject to the inevitable imprecision of rate making proceedings." Id. at 13. Thus, we were confident that a rate constrained by effective product or geographic competition would not be affected by the regulatory process. Id.

In contrast, we found that the harm to the shipper community from continuing to consider product and geographic evidence would be substantial and irreparable. 1998 Decision, slip op. at 13. Indeed, we concluded that the prospect of engaging in substantial threshold litigation

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[4] In Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, 1 S.T.B. 754, 758-59 (1996), both the shipper and railroad interests had opposed a proposal for us to conclude the market dominance inquiry in rail rate cases and announce our findings before taking evidence on the reasonableness of a challenged rate.

[5] AAR Opening Evidence, Joint Verified Statement of Kalt and Willig at 17.

relating to product and geographic competition could deter a captive shipper from bringing a valid complaint to the agency (id.), thus undercutting the Rail Transportation Policy of 49 U.S.C. 10101(6) (RTP-6) to ensure that rates are limited to reasonable levels where effective competition is absent.

In response to a petition for administrative reconsideration filed by the Association of American Railroads (AAR), we again reviewed the legal and policy considerations that provided the basis for the 1998 Decision. In a decision served July 2, 1999 (1999 Decision), we explained that the statute, legislative history, and precedent uniformly support our authority and broad discretion to revise the market dominance standards to exclude consideration of product and geographic competition. 1999 Decision, slip op. at 3-5. We again reviewed the history of rate cases where product and geographic competition had been at issue. We identified many cases where the consideration of such evidence had significantly prolonged and complicated the administrative proceedings. Id at 5-9. We explained why we credited shipper claims that the burdens associated with addressing product and geographic competition can deter a shipper from availing itself of the statutory right to challenge a rate. Id. at 9. Upon reviewing the alternative proposals suggested by the railroads (including limitations on discovery), we explained that none of those proposals would satisfactorily redress the problems associated with consideration of product and geographic competition. Id. at 11-12.

Judicial Remand

AAR sought judicial review, in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), of our determination to exclude product and geographic competition from the market dominance analysis. AAR argued that the statutory definition of market dominance requires consideration of all types of competition, including product and geographic competition. AAR also contended that, in deciding to exclude consideration of product and geographic competition, we had failed to seek a reasonable accommodation of relevant Congressional policies, in particular the policy expressed in 49 U.S.C. 10101(1) (RTP-1): "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."

The court agreed with our finding that the market dominance provisions of the statute do not on their face require consideration of product and geographic competition. Association of Am. Railroads v. STB, 237 F.3d 676, 679-80 (D.C. Cir. 2001) (AAR v. STB). The court also recognized that consideration of product and geographic competition had complicated rail rate cases and made it difficult to comply with the statutory mandate in 49 U.S.C. 10704(d) to expedite the handling of challenges to rail rates. 237 F.3d at 680. But the court found that neither our 1998 Decision nor our 1999 Decision had specifically addressed the RTP-1 policy, which "forcefully expresse[s] . . . a preference for market-based rather than regulatory rate setting." Id. Accordingly, the court remanded the case for us "to weigh the effect, if any, [that the RTP-1 policy] has on the statutory definition of market dominance set out in 49 U.S.C. §[10707(a)]." 237 F.3d at 681.

Request to Reopen the Administrative Record

Following the court's remand, AAR filed a petition to reopen the administrative record in this case. AAR requests that it be afforded yet another opportunity to "advance specific proposals for the development and presentation of evidence of product and geographic competition, including limitations on discovery."[6] It also requests that we direct the shipper and railroad interests "to negotiate compromise rules governing the development of evidence on product and geographic competition."[7]

Various shipper interests have responded, opposing the reopening request.[8] They note that all parties already had an opportunity to be heard on the pros and cons of considering product and geographic competition and to present their own proposals. They assert that negotiations for compromise rules are unlikely to be fruitful given that shippers are "uniformly opposed to consideration of product and geographic evidence."[9]

DISCUSSION AND CONCLUSION

AAR's Petition to Reopen

AAR has presented no compelling reason to further delay this proceeding by reopening the record. AAR proposed limitations on discovery in its earlier comments, but we concluded that any limitations on discovery would not redress the substantial evidentiary and adjudicatory burdens that consideration of product and geographic competition impose on the parties and on us. 1999 Decision, slip op. at 11-12. AAR's petition does not indicate what, if any, additional suggestions it might wish to make that it did not, or was not in a position to, offer in the earlier phases of this proceeding. Accordingly, we have no reason to believe that taking additional comments would provide new insight on the issues involved. Therefore, we see no need to

[6] Petition of the Association of American Railroads to Reopen on Remand, filed Feb. 21, 2001, at 4.

[7] Id. at 4-5.

[8] Reply of Western Coal Traffic League, et al., filed Mar. 9, 2001; Reply of Edison Electric Institute (EEI Reply), filed Mar. 9, 2001; Reply of National Grain and Feed Association (NGFA Reply), filed Mar. 12, 2001; Reply of National Industrial Transportation League (NITL Reply), filed Mar. 13, 2001; Reply of PPL Generation, LLC, et al. (PPL Reply), filed Mar. 13, 2001.

[9] EEI Reply at 3. See also NGFA Reply at 3; NITL Reply at 5; PPL Reply at 2.

prolong this proceeding and extend the uncertainty that non-resolution of this matter imposes on pending rate complaints.[10]

Similarly, we see no need to delay this proceeding for negotiations between railroad and shipper interests. Nothing has prevented the parties from negotiating during the course of this proceeding; shipper interests have not joined in AAR's request for negotiations; and we have no reason to believe that any negotiations now would be fruitful. Of course, parties are always free to meet in an to attempt to reach a consensus on issues without being specifically directed by us to do so, and if a mutually agreeable proposal should result, we will consider the merits of a consensus proposal regardless of the procedural posture of this case.

Rail Transportation Policy

The Rail Transportation Policy set forth in 49 U.S.C. 10101 contains 15 separate and sometimes conflicting policy goals that together establish the framework for regulatory oversight of the rail industry.[11] No special significance attaches to the order in which these various policy goals are set out in the statute,[12] and, notwithstanding the language in RTP-1 highlighted by the court in this case, no single element of the RTP takes precedence to the exclusion of the others. Indeed, when the ICC granted a wide-ranging exemption from regulation based primarily on advancing the RTP-1 goal, the D.C. Circuit remanded the decision and reminded the ICC that the other goals of the statute must also be considered. See Railroad Exemption—Export Coal, 367 I.C.C. 570 (1983), vacated and remanded, Coal Exporters, 745 F.2d at 98 (RTP-1 "must be read in conformity with the other provisions and policies of the Act").[13]

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[10] At present, we have 6 pending rail rate complaints in which market dominance is an issue, and the statute requires us to process them expeditiously.

[11] Coal Exporters Ass'n v. United States, 745 F.2d 76, 98 (D.C. Cir. 1984) (Coal Exporters); Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108, 112, 115 (D.C. Cir. 1987) (Baltimore Gas).

[12] Intramodal Rail Competition—Proportional Rates, Ex Parte No. 445 (Sub-No. 2) (ICC served Apr. 17, 1990) (RTP-1 is not preeminent over the other policy directives of the statute).

[13] See also Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd, Baltimore Gas (allowing railroads to close a variety of routings to improve the industry's financial health over shipper objections that doing so decreased competitive options contrary to RTP-1); Central Power & Light Co. v. Southern Pacific et al., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff'd, MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. denied 120 S.Ct. 372 (declining to interpret our statute as an "open access" statute in order to further the competition goals of RTP-1).

In administering the statute, we must weigh and balance the various RTP elements.[14] In doing so, we are guided by the canon of statutory interpretation that all statutory provisions should be given effect and that no provision should be interpreted in a way that reads other provisions out of the statute. While the court emphasized the phrase "to the maximum extent possible" in the RTP-1 policy directive focusing on reliance on market-based pricing, 237 F.3d at 680, we do not read that phrase of the statute as indicating that RTP-1 should trump the other policy goals when there is a conflict. Rather, we read this statutory language as a recognition that it may not always be possible to favor sole reliance on the marketplace and competition while still giving effect to other relevant policy goals.[15] To the extent that there is tension among different policy goals, we must balance the competing interests in a way that gives effect to each policy.

In issuing our prior decisions in this case, we were fully mindful of the RTP-1 statutory goal and took it into account in our weighing and balancing of the competing policies implicated in this case. See 1999 Decision, slip op. at 10. Based on past experience and our understanding of the workings of the commercial marketplace, we concluded that the revised market dominance procedures would not contravene RTP-1 because they would not likely result in regulatory review of rates in situations where competition is effective. Id.

Having now considered the matter again in response to the court's remand, we specifically conclude that excluding product and geographic competition from consideration in the market dominance analysis is not inconsistent with RTP-1. Indeed, limiting our market dominance analysis in this way should have little, if any, effect on the RTP-1 policy of allowing the marketplace to establish rates. That is because, as we explained in the 1999 Decision, a competitive rate is unlikely to be challenged[16] and, even if challenged, is unlikely to be disturbed.[17]

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[14] See Baltimore Gas, 817 F.2d at 115 (ICC, now STB, is required to "arrive[] at a reasonable accommodation of the conflicting policies set out in [the] statute").

[15] See Coal Exporters, 745 F.2d at 98 (the policy "of establishing reasonable rates 'to the maximum extent possible' through reliance on 'competition and the demand for services' . . . . must be read in conformity with the other provisions and policies of the Act.").

[16] As we explained in the 1999 Decision, slip op. at 10, shippers are not likely to pursue a rate complaint when faster, less costly and more effective self-help is available in the marketplace. To the contrary, rail shippers have adjusted to a primarily unregulated transportation marketplace and have become quite adept at using competitive leverage to obtain the best transportation rates and services.

[17] As we also explained earlier, and in the 1998 Decision, slip op. at 13 & n.60, the railroads' own expert witnesses agreed that "the application [of our market-based rate standards]

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However, experience has shown that consideration of product and geographic competition has a demonstrable negative effect on other relevant RTP goals. As the court recognized, 237 F.3d at 680, the complications and delays resulting from consideration of product and geographic competition are contrary to the Congressional directive that the administrative market dominance procedures be easily administrable (4R Act §202(d)) so that the processing of rate cases can be expedited in accordance with the policy of 49 U.S.C. 10101(2) (RTP-2) and 49 U.S.C. 10101(15) (RTP-15) to resolve disputes expeditiously. See also 49 U.S.C. 10704(c), (d).

Moreover, we must also take into account the policy of 49 U.S.C. 10101(6) (RTP-6) that rates be limited to reasonable levels in the absence of competition. Shippers must have practical, not merely nominal, access to the rate review process to give real meaning to that policy. As we explained in the 1999 Decision, slip op. at 9, a railroad need not be able to prevail on its product and geographic competition arguments for the costs of antitrust-type litigation—in terms of time, money, and other resources—to act as a substantial, potentially insurmountable, barrier to rate complaints. Procedures that thwart a shipper's ability to pursue a valid complaint are clearly inconsistent with RTP-6.

Accordingly, we again conclude that, considering all of the relevant policy goals of the statute, the scale tilts heavily in favor of excluding product and geographic competition from consideration in rail rate cases. Because exclusion of these factors should have little effect on a railroad's ability to set rates in a competitive environment (the goal of the RTP-1), but should significantly advance the equally important goals of expediting cases (the goal of RTP-2 and RTP-15) and ensuring reasonable rates in instances where effective competition is absent (the goal of RTP-6), we continue to believe that this is the most appropriate administrative course of action. Moreover, we are satisfied that our determination here balances and accommodates all the relevant statutory policy directives.

We certify that this action will not have a significant economic impact on a substantial number of small entities. We note, however, that, to the extent small entities may be affected, the impact will be beneficial, as the new policy will enable captive shippers to avail themselves of their statutory rights more expeditiously and at less expense.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

(1) The petition to reopen the administrative record is denied.

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[17](...continued)
tends to yield results not substantially different from rates set by competitive markets."

(2) The determination to exclude product and geographic competition from consideration in the market dominance inquiry in rail rate cases is reaffirmed.

(3) This decision will be effective May 3, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary